

*In the Matter of*

THOMAS SMITH,  
Claimant

v.

SERVICE ENGINEERING CO.,  
Employer,

and

MAJESTIC INSURANCE CO.,  
Carrier.

Date: February 5, 1999

OALJ Case No. 1998LHC1023/1556/1557

OWCP Case No. 13-95043; 13-94416;  
13-89663

Appearances:

Michelle D. Brodie, Esq.  
for Claimant

Judith A. Leichtnam, Esq.  
for Employer and Carrier

Before: Anne Beytin Torkington  
Administrative Law Judge

### **DECISION AND ORDER AWARDING BENEFITS**

The Claimant, Thomas Smith, filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"), for injuries suffered on January 8, 1992, May 8, 1995, and November 15, 1995, while he was working for the Employer, Service Engineering Company. A formal hearing was held in San Francisco on August 28, 1998. All parties, except the Director of the OWCP, were represented by counsel. The following exhibits were admitted into evidence: Claimant's Exhibits ("CX") 1-39, and Employer's Exhibits ("EX") 1-37. The parties called witnesses, offered documentary evidence and submitted oral arguments. This Court took the matter under submission and invited post-trial briefs by the parties which were subsequently submitted. This Court duly considered the evidence submitted at trial, the admitted exhibits, and the briefs and arguments of counsel.

Claimant argues that the date of maximum medical improvement for the injury of November 15, 1995, is January 10, 1997, based on the opinion of the treating physician, Dr. Edward Katz. Claimant argues that he is permanently partially disabled as a result of his work injuries. As a result of injuries to his neck, right shoulder, right wrist, and left shoulder he has

work restrictions of no repetitive flexion, extension or rotation of the head or neck; no heavy repetitive overhead use, pulling, pushing or lifting with either upper extremity, and no repetitive use of the wrists and hands of a heavy nature. Claimant also has subjective pain complaints in his neck and upper extremities which are disabling. As such, he is unable to return to his regular work. Claimant argues that he has a retained earning capacity of \$280.00 per week based on employability as a security guard. In addition, Claimant argues that he is entitled to temporary total disability benefits for the period March 13, 1996 to April 4, 1996 based on Dr. Katz's medical opinion. Finally, Claimant argues that he is in need of future medical treatment based on Dr. Katz's opinion.

Employer argues that the date of maximum medical improvement is December 30, 1996 based on the opinion of Dr. Robert L. Brown. Employer also argues that Claimant is not permanently disabled as a result of the work injuries. Both Drs. Robert L. Brown and Dr. James B. Stark determined that he could return to his regular work. Alternatively, if it is found that Claimant cannot return to his regular work, Employer argues that the Claimant has a retained earning capacity of \$17.00 per hour, or \$680.00 per week. In addition, the Employer argues that the Claimant has no need for further medical treatment. Finally, the Employer argues that it is entitled to Section 8(f) relief if the Claimant is awarded permanent partial disability benefits.

I agree with Employer that the date of maximum medical improvement is December 30, 1996. I agree with Claimant that he is unable to return to his usual work. He has a retained earning capacity of \$390.40. Claimant is entitled to future medical treatment. Claimant waived the issue of temporary total disability benefits. In addition, Employer is entitled to Section 8(f) relief.

### **STIPULATIONS**

The parties stipulate, and I accept that:

1. The parties were subject to the provisions of the Act.
2. The alleged injuries occurred on January 8, 1992, May 8, 1995, and November 15, 1995.
3. The injuries arose out of and occurred in the course of the Claimant's employment with this Employer.
4. The Employer had timely notice of the alleged injuries.
5. The Claimant filed a timely claim for compensation for the injury which occurred on November 15, 1995.
6. The Employer filed notices of controversion for the May 8, 1995 injury and the November 15, 1995 injury, but not for the January 8, 1992 injury.

7. The Claimant's average weekly wage at the time of the January 8, 1992 injury was \$638.44, with a corresponding compensation rate of \$425.63.
8. The Claimant's average weekly wage at the time of the May 8, 1995 injury was \$706.00, with a corresponding compensation rate of \$470.67.
9. The Claimant's average weekly wage at the time of the November 15, 1995 injury was \$725.34, with a corresponding compensation rate of \$483.56.
10. Claimant has not returned to his former job.
11. The Employer voluntarily paid compensation for temporary total disability: from April 7, 1992 to June 1, 1992, at the rate of \$425.63 per week, for a total of \$3,405.04; from January 20, 1992 to August 31, 1994, intermittently for a total of \$899.52; from May 10, 1995 to June 20, 1995, at the rate of \$470.67 per week, for a total of \$2,824.02; from November 16, 1995 to March 12, 1996, at the rate of \$483.56 per week, for a total of \$8,151.44; from April 4, 1996 to January 15, 1997, at the rate of \$483.56 per week, for a total of \$19,825.96. The total of these credits equals \$35,105.98.
12. The Employer is entitled to a credit for State Workers' Compensation payments in the total amount of \$5,594.00.

TR<sup>1</sup> pp.5-6.

### **ISSUES FOR DETERMINATION**

The unresolved issues in this proceeding are:

- 1) What is the date of maximum medical improvement?
- 2) Is the Claimant permanently totally disabled?
- 3) If not, what is his residual wage earning capacity?
- 4) Is the Employer liable for medical services after January 1997?
- 5) Is the Employer entitled to Section 8(f) relief?

TR pp.6-7.

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<sup>1</sup>The abbreviation "TR" refers to the hearing transcript.

## SUMMARY OF EVIDENCE

Claimant has worked for Service Engineering for approximately 18 years. Since 1992 he has worked there as a layout leaderman on ship repair projects. TR p.27, 52-53. Claimant testified that his job duties involved supervising other employees in the shop, reviewing drawings, determining assignments, and working with various steel parts. TR p.27. Approximately forty percent of his time was spent working at a table where he assembled pieces of steel which were later welded together by welders. TR p.40. The number of other layout workers and welders in the shop varied from a high of 30 people to a low of 2 people depending on the amount of repair work. TR p.50.

Claimant testified that he would lift 200 to 250 pound steel plates. The plates are located on horizontal racks, vertical racks, and some are just laying on the floor. He testified that removing steel plates from the horizontal racks required overhead lifting. TR pp.28-29. Claimant also testified that he would push and pull steel plates weighing up to 1,000 pounds. TR p. 30. The steel plates are used to build various structures including metal piping, brackets, helicopter hangers and antenna foundations. TR p.30.

Claimant testified about his three work injuries with the Employer. He injured his right shoulder on January 8, 1992. Claimant originally treated with a "company" doctor and then changed to Dr. Katz who has treated him ever since. Claimant had shoulder surgery and was off of work for about 10 to 12 weeks. According to the Claimant, Dr. Katz instructed him to "take it easy" and if he had problems, he should find a different way to perform the work. TR pp.31-32.

Claimant injured both wrists on May 8, 1995. TR p.32. He was off work for about 5 weeks as a result of this injury. TR p.6. Claimant testified that when he returned for work, Dr. Katz gave him the same work restrictions. Claimant had some difficulty carrying out his job duties because he could not use his left hand. This problem continued up to his third injury of November 1995. TR pp.32-33.

Claimant injured his neck, both shoulders and both wrists in November 1995. Dr. Katz took him off of work, and he has not returned to work. TR p.33. Claimant had right wrist surgery on April 4, 1996. He testified that he no longer sees Dr. Katz because the Carrier has refused to pay for the treatment. TR p.34.

Dr. Edward Katz, a board certified orthopedic surgeon, testified that he is Claimant's treating physician. TR p.118. CX 30. Dr. Katz began treating Claimant for his right shoulder injury of January 8, 1992. He performed right shoulder surgery on April 7, 1992 and took Claimant off of work for about 3 months. Dr. Katz then released Claimant to return to work with prophylactic restrictions of no overhead repetitive activities, pulling and pushing above the shoulder level for the right shoulder. TR pp.119-120. CX 28. Dr. Katz continued to treat Claimant for his May 8, 1995 left wrist injury. TR p.120. Dr. Katz also treated Claimant for his November 15, 1995 right wrist, shoulder and neck injuries. Dr. Katz performed carpal tunnel

surgery on Claimant's right wrist on April 4, 1996. TR p.121; CX 27. Claimant's current diagnosis is chronic cervical strain, right shoulder strain, left shoulder strain, left shoulder degenerative arthritis, and post carpal tunnel release right wrist. TR p.121. Dr. Katz testified that the degenerative arthritis is a result of repetitive use of Claimant's left upper extremity; thus the injury is industrial in nature. Id.

On June 2, 1997, Dr. Katz issued a report indicating that Claimant's disability was permanent, stationary, and rateable as of January 10, 1997. Dr. Katz found permanent restrictions of heavy overhead activities of pulling, pushing, and lifting with his right upper extremity, and concluded that Claimant cannot return to his regular work. CX 11.

Dr. Katz took Claimant off of work as of November 15, 1995, and he has not released him to return to work. Claimant is currently disabled with restrictions of no repetitive flexion, extension or rotation motion of his neck/head; no heavy repetitive use, pulling, lifting above shoulder level for both of his upper extremities; no repetitive use of his hands and wrists of a heavy nature. TR p.122. Claimant's subjective pain complaints for his neck are also disabling. TR p.123. Dr. Katz testified that Claimant is unable to return to his regular work at Service Engineering based on his three industrial injuries. TR p.124. Dr. Katz is familiar with Claimant's job duties based on a review of the medical records and discussions with Claimant. TR p.123.

Dr. Katz also testified that Claimant requires future medical treatment including occasional cortisone injections for shoulder pain, physical therapy treatments for flare-ups, and over the counter medications such as Advil or Alleve. TR p.125.

Dr. James B. Stark, who is board certified in physical medicine and rehabilitation, testified on behalf of the Employer. EX 28. Dr. Stark examined Claimant on two occasions and submitted two reports dated September 29, 1997 (EX 29) and May 4, 1998 (EX 30). TR p.153. Dr. Stark diagnosed Claimant with: 1) status post right shoulder subacromial decompression; 2) left shoulder subacromial impingement syndrome; 3) status post right carpal tunnel surgery; 4) bilateral lateral epicondylitis; and 5) heightened paracervical muscle tension syndrome. TR pp. 157-158; EX 29. Dr. Stark indicated that Claimant reached maximum medical improvement in August 1997 when Dr. Stark first examined Claimant. TR p.160. Regarding work restrictions for the right shoulder, Dr. Stark testified that Claimant should avoid repetitive, forceful, or prolonged over the shoulder activity. TR pp.161-162. Likewise, Claimant has the same prophylactic restrictions for his right shoulder. TR p.163. Regarding restrictions for Claimant's neck, Dr. Stark testified that there was no actual work restriction, but on a prophylactic basis Claimant should avoid prolonged and repetitive upward gaze and prolonged maintaining of his neck in one position. TR p.164. Regarding restrictions for Claimant's right wrist, Dr. Stark testified that Claimant is restricted from repetitive power gripping, and repetitive finger activities. TR p.167. Dr. Stark also testified that Claimant could return to his regular work at Service Engineering. TR p.169.

Claimant testified that he has not returned to work, and the Employer never offered any

modified work.<sup>2</sup> TR p. 35. He feels that he is physically not able to work full-time. TR pp.45-46. Claimant testified regarding his education level and training. He has a G.E.D. and has taken courses at the College of San Mateo since 1994. Currently he is taking computer aided drafting classes (“CAD”) at night, six hours per week. According to the Claimant, he has some difficulty with the course work because of his neck and right wrist. At his current rate of one course per term, Claimant will complete the CAD program in 2000. TR pp.35-37.

Regarding his job search, Claimant testified that he just looks through the paper and at the bulletin boards at the College of San Mateo. TR pp.36-37. He has not applied for any jobs. TR p.41.

Claimant described his current complaints. He has pain in his shoulders after any physical activity, but they do not hurt at rest. TR p.39. Claimant has pain in his neck which increases upon doing physical activities.

Mr. Curt McMichael testified on behalf of the Claimant. He is a vocational rehabilitation counselor, certified by OWCP. TR p.68; CX 29. McMichael’s understanding of Claimant’s job duties is based on two meetings with the Claimant, a job description which was prepared by the Claimant and the local union<sup>3</sup>, and a review of the Dictionary of Occupational Titles (“DOT”) description of a shipfitter. TR pp.69-71. He reviewed the DOT description with Claimant, and Claimant agreed with it. TR p.71. McMichael described the layout leaderman position as follows. The worker is involved in the assembling and fabrication of metal structural parts for ships. These parts are usually made out of steel or other heavy forms of metal. The worker positions the material, reviews the assembling drawings, and cuts and assembles the product. The DOT describes the job as heavy work involving lifting of up to 100 pounds. TR p.71. McMichael also reviewed Claimant’s medical restrictions per Dr. Katz and Dr. Stark and referred Claimant to Mills Peninsula Hospital for vocational testing. TR pp.72-73, 75. McMichael concluded that Claimant cannot return to his regular work at Service Engineering. TR p.90.

McMichael testified that Claimant is employable. However, Claimant does not present himself in a favorable way — he speaks slowly and lacks energy. TR pp.74-75. He needs a job that is not fast paced, and one that does not require him to produce. Claimant could work as a cashier at a self service gas station or as a desk clerk at a residential hotel. TR p.78. Claimant’s goal to work as a CAD drafter is not appropriate because it requires repetitive use of his hands. TR pp.76-77. Finally, McMichael concludes that Claimant is employable as a security guard, and could expect a starting salary of \$7.00 an hour. TR pp.78-80.

Mr. Howard Stauber, a vocational rehabilitation counselor, testified on behalf of the

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<sup>2</sup>Service Engineering went out of business shortly after Claimant’s November 1995 injury.

<sup>3</sup>Claimant testified that he had prepared the job description and had a union official sign it. TR pp.48-49.

Employer. TR p.186; EX 35. Mr. Stauber asked Claimant's attorney if he could meet with Claimant. Claimant's attorney never responded; therefore, Mr. Stauber did not meet with Claimant. Mr. Stauber did review the medical records from Drs. Katz, Brown and Stark, a job description prepared by Claimant, Claimant's interrogatory responses, a report from Mills Peninsula Hospital, and Mr. McMichael's report. TR p.188. Based on Claimant's physical restrictions, educational level, and job skills, Mr. Stauber identified 21 job openings that would be suitable alternative employment. The job openings were in the positions of dispatcher, customer service advisor, light delivery driver, benchwork assembler, light duty welder, shop helper positions, warehouse manager and maintenance supervisor positions. TR pp.190-192; EX 36.

## CONCLUSIONS OF LAW

### Date of Maximum Medical Improvement

An injured worker's impairment may be considered permanent when the employee's condition reaches the point of maximum medical improvement ("MMI"). See *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1988); *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). The date on which a claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. See *Trask, supra*. A date of permanency may not be based on the mere speculation of a physician. See *Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439 (1976). If a physician does not specify the date of maximum medical improvement, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). However, where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable to find that the date of maximum medical improvement has been reached. See *Dixon v. John J. McMullen & Associates*, 19 BRBS 243 (1986). In contrast, permanency does not mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. See *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Similarly, a temporary worsening of a condition does not render a permanent disability temporary. See *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. The claimant's employment status is not relevant. See *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

Claimant argues that the date of maximum medical improvement ("MMI") is January 10, 1997. Dr Katz, the treating physician, indicated in his report dated June 2, 1997 that Claimant's

condition became permanent, stationary, and rateable as of January 10, 1997. CX 11. However, Dr. Katz did not explain why Claimant's condition had reached a plateau on January 10, 1997. Curiously, Dr. Katz's report dated January 8, 1997 is silent on this issue. CX 14. As such, I give little weight to Dr. Katz's retrospective determination.

Employer contends that the MMI date is December 30, 1996 based on the opinion of Dr. Robert L. Brown. Dr. Brown, a board certified orthopedic surgeon (EX 25), evaluated Claimant on December 30, 1996. Dr. Brown reviewed Claimant's prior medical records and issued a detailed report on January 10, 1997. Dr. Brown found that Claimant was permanent and stationary for his right hand. Claimant had a full range of joint motion and had recovered excellent grip strength. EX 27. Dr. Brown had previously evaluated Claimant on February 20, 1996.<sup>4</sup> EX 26.

Dr. Stark indicated that Claimant had reached maximum medical improvement when he first examined him in August 1997. TR p.160. He provided no explanation for this opinion. Dr. Stark also did not address whether Claimant had reached an earlier MMI date. As such, his opinion is not particularly helpful.

In sum, I find that Claimant's date of maximum medical improvement is December 30, 1996, which is over seven months after Claimant's right wrist surgery. Dr. Brown's detailed and contemporaneous opinion is more persuasive than Dr. Katz's retrospective opinion.

#### Permanent Total Disability

Claimant argues that he unable to return to his usual work because of physical restrictions resulting from his three work injuries. In order to establish permanent total disability, a claimant must prove by a preponderance of the evidence that he is unable to perform his usual job due to his work related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. See *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). At this initial stage, claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. See *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). Usual employment is the claimant's regular duties at the time he was injured. See *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). The claimant's credible complaints of pain alone may be enough to meet his burden. See *Anderson, supra*. However, a judge may find a claimant able to do his usual work despite his subjective complaints, when a physician finds no functional impairment. See *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981).

Dr. Katz indicated that Claimant has the following permanent restrictions: no repetitive flexion, extension or rotation motion of his neck/head; no heavy repetitive use, pulling, lifting

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<sup>4</sup>Employer states that Dr. Brown had evaluated Claimant on five occasions; however, Employer only submitted evidence concerning two examinations.

above shoulder level for both of his upper extremities; no repetitive use of his hands and wrists of a heavy nature. TR p.122. Dr. Stark indicated that Claimant had permanent restrictions of no repetitive, forceful, or prolonged over-the-shoulder work.

In contrast, the vocational evaluation report by Mills Peninsula Hospital dated August 15, 1998 indicates that Claimant should be restricted to part-time sedentary work. CX 38. This report is not credible. The opinion was provided by Sharon M. Rider, an occupational therapist. She is not a doctor, and is not qualified to render a disability opinion. Dr. Stark also persuasively testified that a sedentary restriction is not appropriate because Claimant's injuries are to his upper extremities. TR p.171-173. Dr. Katz testified that he agreed with the Mills Peninsula Hospital report, but he did not specifically address the part-time sedentary work recommendation. TR pp. 125-126.

Claimant argues that he is unable to return to his regular work based on the restrictions placed on him by Drs. Katz and Stark. Claimant testified that the layout leaderman position required heavy work including lifting, pushing and pulling heavy steel plates. Occasionally, this heavy lifting would be above shoulder level. TR pp.27-31. Claimant submitted a job description which was signed by Mr. Michael G. Grabowski, the business manager/treasurer of Boilermakers Local Lodge #6. CX 32. However, Claimant actually wrote the description and merely had Mr. Grabowski sign it. TR pp.48-49. In addition, Claimant's vocational expert Mr. McMichael testified that he reviewed the DOT job description with Claimant, and Claimant had agreed with the description. TR p. 71. The DOT strength rating for a shipfitter indicates that the position involves heavy work. See DOT code 806.381-046. Heavy work is defined as "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." See DOT Appendix C, IV. The DOT job description for a shipfitter is as follows:

Lays out and fabricates metal structural parts, such as plates, bulkheads, and frames, and braces them in position within hull of ship for riveting or welding: Lays out position of parts on metal, working from blueprints or templates and using scribe and handtools. Locates and marks reference lines, such as center, buttock, and frame lines. Positions parts in hull of ship, assisted by RIGGER (ship-boat mfg.). Aligns parts in relation to each other, using jacks, turnbuckles, clips, wedges, and mauls. Marks location of holes to be drilled and installs temporary fasteners to hold part in place for welding or riveting. Installs packing, gaskets, liners, and structural accessories and members, such as doors, hatches, brackets, and clips. May prepare molds and templates for fabrication of non-standard parts. May tack weld clips and brackets in place prior to permanent welding. May roll, bend, flange, cut, and shape plates, beams, and other heavy metal parts, using shop machinery, such as plate rolls, presses, bending brakes, and joggle machines.

See DOT code 806.381-046.

Employer did not offer any job analysis or testimony from other employees or managers from the plate shop. Rather, Employer's vocational expert, Mr. Stauber, testified that plate shop

workers did not lift over 30 pounds. TR p.210. Mr. Stauber based this opinion on five prior visits to the Employer's plate shop that occurred in 1994 or 1995. These visits were for the purpose of developing job analyses on other cases. TR pp.207-208. Mr. Stauber's description is not credible. His visits were prior to Claimant's last period of work in the plate shop. At best, Mr. Stauber's impression represents several specific points in time prior to Claimant's last period of employment. In addition, his testimony was not specific as to the times and dates of his visits, nor was it specific as to which cases he was working on. Mr. Stauber did not offer any documentation supporting these visits.<sup>5</sup>

In sum, the only credible information concerning Claimant's job duties was provided by the Claimant himself. His description is reasonable; it is not internally inconsistent; and it is consistent with the DOT job description.

Dr. Katz testified that Claimant could not return to his usual work because of his combined physical restrictions for all of his injuries. Dr. Katz testified that even though Claimant had returned to work after shoulder surgery for his January 1992 injury, Claimant had additional restrictions based on his November 1995 injury. TR p.124.

Employer argues that Dr. Katz's opinions do not support a finding that Claimant cannot return to his usual work. Dr. Katz's report of February 21, 1995 indicates restrictions of no overhead activities and no repetitive pulling and pushing. EX 21. Claimant was working at this time. Dr. Katz indicated in his September 15, 1997 report that Claimant's restrictions were no overhead activities of pulling, pushing and lifting. CX 7. On November 3, 1997, Dr. Katz reported restrictions of no repetitive overhead activities of pulling, pushing, and lifting. CX 6. Dr. Katz admitted on cross examination that these restrictions were "pretty similar." TR pp.136, 139. Prior to the injury of November 15, 1995, Dr. Katz never indicated that Claimant could not perform his regular work. Yet, Dr. Katz now recommends that Claimant cannot return to his usual work despite the fact that his work restrictions are basically the same. However, Dr. Katz does indicate new restrictions of no repetitive flexion, extension or rotation of the head or neck. TR p.122. Dr. Katz testified that these new restrictions in combination with Claimant's prior restrictions prevents Claimant from returning to work. TR p.124. Employer argues that this restriction is not disabling since there is no evidence in the record that Claimant's job duties require this type of physical activity.

Employer argues that Drs. Stark and Brown indicate that Claimant can return to his regular work. Dr. Stark testified that Claimant could return to his regular work. Dr. Stark noted that since Claimant was able to return to work after his first two injuries he should be able to return to work after the last injury to his wrist. However, this opinion was premised on the assumption that Claimant could obtain help from other co-workers to avoid any heavy overhead

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<sup>5</sup>Presumably, if Mr. Stauber did visit the plate shop on several occasions to prepare a job analysis of a plate shop worker position, there would exist a job analysis report for the position. Employer did not offer such a report.

lifting. TR pp.169-170. The record here does not support such a presumption. Claimant testified that at times there would be only one other worker in the plate shop depending on the volume of repair work. As a result it was not always possible to obtain assistance with overhead lifting. In addition, Claimant testified that he had difficulty working after he returned to work from the May 8, 1995 injury. Claimant could only use one hand, since his left hand was causing problems. TR pp. 32-33.

Dr. Brown issued a report dated January 10, 1997, but did not testify at the hearing. Dr. Brown found that Claimant suffered no permanent impairment as a result of his right upper extremity injury. Dr. Brown indicated that Claimant could return to his usual and customary work. Dr. Brown did not address Claimant's other two work injuries. His opinion regarding Claimant's ability to return to work is conclusory. As such, I give it little weight.

In sum, I find that Claimant cannot return to his regular work. Dr. Katz, Claimant's treating physician, clearly indicates that Claimant cannot return to his regular work based on a combination of restrictions for his three work injuries. Dr. Stark's opinion is not as persuasive since it is premised on Claimant's ability to obtain lifting assistance on the job. In addition, Claimant's testimony regarding his job duties and ability to perform them was credible. Claimant's regular work is heavy in nature and requires some lifting above the shoulder level. As such, Claimant cannot return to that work.

#### Retained Earning Capacity

Since Claimant has established that he cannot return to his regular work, he will be considered permanently totally disabled unless the employer establishes suitable alternative employment. See *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. See *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough. See *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. See *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Claimant's vocational expert, Mr. McMichael, indicates that Claimant is currently

employable as a security guard at a starting salary of \$7.00 per hour, equaling \$280.00 per week. However, Mr. McMichael's conclusion that Claimant is only employable at an entry level job such as a security guard is not persuasive. Mr. McMichael appears to be ignoring Claimant's 18 years of work experience and transferable skills from his work at Service Engineering. His justification for entry level work is not based on any lack of education, poor test results, and/or language problems. Rather, Mr. McMichael's conclusion is based on Claimant's physical appearance, slow movements, pain behavior and inability to work at a fast pace. TR p.77. Mr. McMichael seems to argue that since Claimant's demeanor is not "interview friendly" he must be relegated to unskilled entry level work. His conclusion is overly pessimistic, and there is nothing in the record to suggest that employers would be unwilling to offer him a job because of his demeanor and presentation skills. In addition, Mr. McMichael admits that vocational counseling could be provided to improve an individual's interview skills. TR p.112.

Employer's expert, Mr. Stauber, indicates that there is suitable alternative work available paying \$8.50 to \$17.00 an hour currently, and such work was available in January 1997, paying \$8.00 to \$15.00 per hour. He found these job opportunities available in the fields of dispatcher, customer service representative, service advisor, light delivery driver, benchwork assembly, light duty welder, shop helper, warehouse manager, and maintenance manager. TR p.192; EX 36. Mr. Stauber's employment recommendations are reasonable and well supported. He identified specific job openings including their wages and physical requirements. EX 36. Physically, these jobs are light in nature and are consistent with Claimant's work restrictions. Dr. Stark testified that they are physically appropriate. TR p.183. Each job opportunity is consistent with the Claimant's age, education, work experience, and skill level. In addition, they are all within the reasonable geographic area in which Claimant resides in San Mateo County. TR p.192.

Claimant argues that the jobs identified by Mr. Stauber are either unavailable, inappropriate or have lower wages than Mr. Stauber found. Mr. McMichael contacted roughly half of the employers that Mr. Stauber identified. TR p.80. Mr. McMichael found that many of these positions had been filled. However, Employer is not required to act as an employment agency. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). Employer's burden is to identify representative suitable alternative employment, not guarantee that a specific job with a specific employer will always be available. Mr. McMichael's criticism of the physical and experience requirements and level of wages is not persuasive. Mr. McMichael did not contact the individuals that Mr. Stauber did. Mr. Stauber contacted individuals who were doing the actual hiring at the companies. TR pp.94-98, 199-204.

Claimant testified that he is not physically capable of returning to full time work. TR pp.45-46. However, he did not specifically address his ability to perform the occupations identified by the vocational experts. Claimant did describe his subjective pain complaints. His neck pain prevents him from doing household chores, taking walks, driving, and any kind of physical activity. TR pp.37-38. Claimant's pain in his shoulders prevents him from reaching, pulling, and pushing activities and prevents him from doing pushups and pullups. TR pp.39-40. Claimant's pain in his wrists causes difficulty with using a computer, doing the dishes, and lifting objects. TR p. 40. However, I do find that they are not an accurate representation of his

disability status nor his ability to perform suitable alternative work. None of the physicians indicated that Claimant was incapable of performing full time work. Likewise, they did not provide such work restrictions with such a substantial magnitude. For example, Dr. Katz, the treating physician, testified that he would not limit Claimant to part time work, nor to sedentary work. TR p.147. Furthermore, Claimant's characterization of his physical ability to return to alternative work is out of line with the nature and extent of his disabilities.

Next, Claimant's attorney argues that Claimant's interest in computer aided drafting ("CAD") is not an appropriate objective because of the repetitive nature of the work. I agree. Claimant testified that he has had difficulty handling one CAD class a semester because of pain complaints in his hand and wrist. Mr. McMichael concluded that given the repetitive nature of the work and Claimant's limitations on repetitive movements of his hands and wrists, CAD work would not be appropriate. TR pp.75-77.

Claimant does not offer any evidence of a diligent effort to search for work. Claimant testified that he has not actively looked for a job nor applied for any job since November 1995.<sup>6</sup> TR p.36, 41.

In sum, Employer has met the burden of showing suitable alternative employment. The positions of dispatcher, customer service advisor, light delivery driver, benchwork assembly, and warehouse manager are all suitable alternative employment. A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. See *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. See *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985).

Claimant's condition became permanent on December 30, 1996. Mr. Stauber indicated that suitable alternative employment was available as of January 1997. At that time the starting salaries available for these positions ranged from \$8.00 to \$15.00 per hour, with an average salary of \$9.37 per hour. EX 36, pp.137, 149. This average salary is a reasonable reflection of Claimant's retained earning capacity which equates to \$374.80 per week.<sup>7</sup>

Once a claimant's post-injury earning capacity has been established, it must be adjusted to account for inflation. See *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Ordinarily, this should be done by using the wage level that prevailed for the claimant's post-

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<sup>6</sup>Claimant did testify that he looked through the ads in the newspaper. TR p.36.

<sup>7</sup>Mr. Stauber also determined that the average salary for the suitable alternative positions that were available in 1998 was \$9.76 per hour. These positions and average salary are not significantly different from the 1997 results.

injury employment at the time of the injury. See *Bethard, supra*. When, as in this case, there is no evidence of what a post-injury job paid at the time of the injury, an administrative law judge should adjust the claimant's post-injury wage earning capacity by the percentage increase in the National Average Weekly Wage (NAWW), which is determined by the Secretary of Labor pursuant to the provisions of Section 6(b)(3) of the Act. See *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Here, the NAWW increased 2.3% between November 15, 1995 and January 1997. Therefore, when adjusted to reflect the changes in the NAWW, a \$374.80 weekly wage in 1997 was equivalent to a weekly wage of \$366.18 in 1995. Therefore, beginning January 1, 1997, Claimant is entitled to permanent partial disability benefits of two thirds times the difference of the average weekly wage (\$725.34) less his retained earning capacity (\$366.18), which equates to a compensation rate of \$239.44 per week.

### Medical Treatment

Section 7 (a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer denied Dr. Katz's bills for treatment after January 1997. Employer argues that these visits were only for progress reports, and Dr. Katz did not provide any active treatment. Employer also argues that Claimant is not in need of any active medical treatment. Claimant argues that he is in need of future medical treatment, and Employer should be liable for Dr. Katz's bills that were denied after January 1997.

Dr. Katz testified that Claimant requires future medical treatment including occasional cortisone injections for shoulder pain, physical therapy treatments for flare-ups, and over the counter medications such as Advil or Alleve. TR p.125. In contrast, Dr. Stark indicates that Claimant needs stretching and strengthening exercises for neck and forearm pain. Dr. Stark also states that no further diagnostic testing or surgery is indicated. EX 29. However, Dr. Stark did testify that occasional use of prescription pain medications would be reasonable. TR p.174. I find that an award for future medical treatment is appropriate. Dr. Katz's recommendations for future treatment appear reasonable in light of the fact that Claimant is permanently disabled and is presently symptomatic.

Since January 1997, Claimant visited Dr. Katz on 12 separate occasions. CX 1-14. In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532 (1979). These visits were reasonable and necessary medical treatment. Dr. Katz examined the Claimant on each occasion, monitored his condition, and prescribed prescription medication. Therefore, the Employer is also liable for Dr. Katz's denied bills for treatment rendered after January 1997.

## Section 8(f) Relief

Section 8(f) of the Act shifts part of the liability for permanent partial and permanent total disability, and death benefits from the employer to the Special Fund established under Section 44. Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing disability to result in greater permanent disability that would have been caused by the industrial injury alone. See *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143 (9th Cir. 1991). An employer is entitled to Section 8(f) relief when: 1) the employee has a pre-existing permanent partial disability; 2) the disability was manifest to the employer; and 3) the current disability is not due solely to the industrial injury. See *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990); *FMC Corporation v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989). And when an employee is permanently partially disabled, the employer must also show that the current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. See *Two "R" Drilling Co, Inc. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). Section 8(f) relief is available even where the pre-existing disability and the second injury result from the same course of employment with the same employer. See *Director, OWCP v. Potomac Electric Power Co. (Brannon)*, 607 F.2d 1378 (D.C. Cir. 1979), *aff'g sub. nom. Brannon v. Potomac Electric Power Co.*, 6 BRBS 527 (1977). If the Employer successfully invokes Section 8(f) relief, its liability for permanent disability benefits is generally limited to 104 weeks.

Section 8(f)(3) specifies that an employer must raise the issue of Section 8(f) relief with the Director prior to the Director's consideration of the claim. Failure to do so is an absolute defense to the Special Fund's liability for payment of benefits. See 33 U.S.C. § 908(f)(3). A request for Section 8(f) relief should be made as soon as the permanency of a claimant's condition is known or is an issue in dispute. See 20 C.F.R. § 702.321(b)(1). The regulations require that the employer submit a fully documented application including medical evidence. See 20 C.F.R. § 702.321(a)(1); *Cajun Tubing Testors v. Hargrave*, 951 F.2d 72 (5th Cir. 1992). Where an employer raises the Section 8(f) issue before the District Director but fails to submit a complete application, the absolute defense may be raised and a judge cannot consider the merits of the employer's Section 8(f) request without initially considering whether the request submitted to the director was sufficiently documented. See *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992). The Director bears the burden of affirmatively raising the absolute bar as a defense and forwarding a copy of the application for Section 8(f) relief to the judge along with other necessary documents. See 20 C.F.R. §§ 702.321(b)(3), 702.321(c); *Tennant, supra*.

Employer filed its Petition for Section 8(f) Relief with OWCP on February 18, 1998. EX 17. On August 14, 1998, the Director filed a Notice of Appearance objecting to Employer's claim for Section 8(f) relief. The Director argued that Employer failed to submit medical evidence in support of its Section 8(f) application. It is not clear whether the Director did not receive any medical evidence with the Section 8(f) petition or whether the Director merely argues that the medical evidence that was submitted is insufficient to establish Section 8(f) relief. The Director did not attend the hearing nor did he file a post trial brief. On December 11, 1998, I issued the Director an Order to Show Cause why I should not accept certain findings, including a finding

that Employer established entitlement to Section 8(f) relief. In the Order to Show Cause, I explained that: “It is not clear whether the Director did not receive any medical evidence with the Section 8(f) petition or whether the Director merely argues that the medical evidence that was submitted is insufficient to establish Section 8(f) relief.” A response was due by December 24, 1998. The Director requested two extensions of time for a response. I granted the requests for an extension until February 2, 1999.

On February 2, 1999, the Director responded to the Order to Show Cause. The Director is not raising the absolute defense regarding the Employer’s application for Section 8(f) relief. The Director now stipulates that Employer is entitled to Section 8(f) relief if Claimant is entitled to permanent disability. The parties stipulate and I accept that Employer is entitled to Section 8(f) relief.

### Temporary Total Disability

Claimant argues that he is entitled to temporary total disability benefits for the period March 13, 1996 to April 4, 1996. This issue was not raised at the hearing.<sup>8</sup> TR pp.6-7. Instead, Claimant raised this issue for the first time in its post hearing brief. Employer did not address this issue in its post hearing brief.

Under Section 702.336(b) of the regulations, at any time prior to the filing of a compensation order, an administrative law judge (ALJ) may in her discretion, upon the application of a party or upon her own motion, consider a new issue raised by one of the parties. If the ALJ elects to consider the new issue, the parties must be notified and given the opportunity to present argument and new evidence. See 20 C.F.R. § 702.336(b). However, the ALJ in her discretion may elect not to consider the new issue if the motioning party had an opportunity to raise it at the hearing. See *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Here, Claimant failed to timely raise the issue of temporary disability benefits. Claimant was aware of the periods of temporary disability benefits that the Employer had paid. He stipulated to those payments at the hearing. TR p.6. Claimant had an opportunity to raise the issue at the hearing, but failed to do so. As a result, the Employer was deprived of an opportunity to present evidence in its defense. In addition, Claimant does not offer any excuse as to his failure to timely raise the issue. Therefore, I find that Claimant has waived the issue of entitlement to temporary total disability benefits.

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<sup>8</sup>In his Pre-Trial Statement, Claimant stated that he was temporarily disabled from November 16, 1995 through January 15, 1997. However, Claimant did not indicate that there was an issue as to the periods of compensation that Employer was still required to pay. See Claimant’s Pre-Trial Brief, p. 2. At the hearing, Dr. Katz did testify regarding Claimant’s period of temporary disability. TR p.122.

## **ORDER AND AWARD**

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I issue the following Order:

1. Employer shall pay Claimant permanent total disability benefits at the compensation rate of \$483.56 per week based on an average weekly wage of \$725.34 for December 30, 1996 and December 31, 1996.
2. Employer shall pay Claimant permanent partial disability benefits at the compensation rate of \$239.44 per week, based upon an average weekly wage of \$725.34 and a retained earnings capacity of \$366.18, as of January 1, 1997.
3. Respondents shall receive a credit for any and all sums paid to the Claimant under the California Workers' Compensation Act, pursuant to § 3(e) of the Act.
4. The Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.
5. The Director shall make all calculations necessary to carry out this Order.
6. The Employer shall provide the Claimant all past and future medical care that is reasonable and necessary for the treatment of the sequelae of the compensable injuries.
7. Beginning 104 weeks from December 30, 1996 and until ordered otherwise, the Special Fund shall pay the Claimant compensation for permanent partial disability at the rate of \$223.29 per week.
8. The Employer is entitled to reimbursement from the Special Fund for all permanent partial disability payments made 104 weeks after December 30, 1996, the date the Claimant's disability became permanent.
9. For legal work done after this case was referred to the Office of Administrative Law Judges, counsel for the Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for the employer within 21 days of the date this Decision and Order is served. Counsel for the employer shall provide the undersigned and the claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for the claimant shall initiate a verbal discussion with counsel for the employer in an effort to amicably resolve as many of the employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written

notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of the employer's Statement of Objections, the claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for the employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for the employer no later than 30 days after service of the employer's Statement of Objections. Within 14 days after service of the Final Application, the employer shall file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

**IT IS SO ORDERED.**

San Francisco, California

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ANNE BEYTIN TORKINGTON  
Administrative Law Judge